

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 10, 2018

Diane M. Fremgen
Acting Clerk of Court of Appeals

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2016AP1721-CR

Cir. Ct. No. 2013CF1233

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DANTE L. DAVIS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Kenosha County: BRUCE E. SCHROEDER, Judge. *Affirmed.*

Before Reilly, P.J., Gundrum and Hagedorn, JJ.

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. A jury convicted Dante Davis of two counts of strangulation and suffocation (domestic abuse), two counts of disorderly conduct (domestic abuse), felon in possession of a firearm, and possession of tetrahydrocannabinols. Davis appeals from the judgment of conviction and from the order denying his postconviction motion seeking a new trial due to the erroneous admission of other acts evidence and ineffective assistance of counsel. We agree with the circuit court that Davis's postconviction motion did not warrant a hearing. We affirm.

¶2 A circuit court has the discretion to deny a postconviction motion without a hearing if the motion is legally insufficient. *State v. Allen*, 2004 WI 106, ¶12, 274 Wis. 2d 568, 682 N.W.2d 433.

The circuit court may deny a postconviction motion for a hearing if all the facts alleged in the motion, assuming them to be true, do not entitle the movant to relief; if one or more key factual allegations in the motion are conclusory; or if the record conclusively demonstrates that the movant is not entitled to relief.

Id. (footnote omitted).

¶3 The charges against Davis arose from October 2013 violence against R.W., his then-romantic partner. The complaint alleged that Davis choked R.W. on more than one occasion, hit and punched her and otherwise physically abused her.

¶4 Pretrial, the State moved the circuit court to admit the testimony of K.K., a prior romantic partner of Davis. K.K. would testify that, in April 2004, Davis inflicted similar acts of domestic violence upon her, including choking her when she did not act as Davis expected. The State argued the similarity of the circumstances described by R.W. and K.K., i.e., both K.K. and R.W. were live-in

companions of Davis, Davis engaged in domestic abuse by punching and choking them when he was displeased with something they had or had not done, and Davis threatened to kill each of them. The State argued that K.K.'s testimony was admissible as other acts evidence under *State v. Sullivan*, 216 Wis. 2d 768, 576 N.W.2d 30 (1998): K.K.'s evidence was offered for permissible purposes, intent or absence of mistake or accident, and the evidence was relevant despite the amount of time between the women's experiences (K.K. in 2004 v. R.W. in 2013).

¶5 Davis objected to the admission of K.K.'s testimony because it was remote in time, K.K. had recanted some of her accusations,¹ and K.K.'s testimony would be unfairly prejudicial. The circuit court did not agree that the 2004 events involving K.K. were too remote from the 2013 events involving R.W. The circuit court implicitly determined that K.K.'s evidence was relevant and not unfairly prejudicial. However, the circuit court deferred until trial a final decision on the admissibility of K.K.'s testimony.

¶6 At trial, the circuit court decided to admit K.K.'s testimony.² The court instructed the jury about the limited purpose of K.K.'s testimony: K.K.'s testimony was being received to address issues of intent, motive and method of

¹ On appeal, Davis relies upon this recantation to argue that K.K.'s testimony was unfairly prejudicial. During her trial testimony, K.K. addressed the reasons she recanted (Davis's family had threatened her), and she affirmed the 2004 domestic violence incidents to the jury. Davis cites no authority to suggest that a prior recantation precludes other acts testimony.

² Neither party discusses the circuit court's reasoning for its other acts ruling or cites to that portion of the record where the circuit court's reasoning for this evidentiary ruling can be found. The circuit court's postconviction order does not recite the circuit court's time-of-trial reasons for this evidentiary ruling. In the absence of citation to the record, we search for reasons to sustain a discretionary decision. *State v. Opalewski*, 2002 WI App 145, ¶7, 256 Wis. 2d 110, 647 N.W.2d 331. We will rely upon the discussion in the order denying the postconviction motion as the basis for the circuit court's time-of-trial evidentiary ruling.

operation. The jury was further instructed that Davis was not on trial for his conduct toward K.K., and the jury should not consider K.K.'s testimony to conclude that Davis has a certain character or character trait such that the charged offenses were in conformity with that character.

¶7 K.K. testified that, in April 2004, she was living with Davis, her romantic partner of approximately three years. She testified that before Davis moved into her home, she did not experience any domestic violence. After Davis moved into her home, he became “evil” and violent.³ On April 13, 2004, Davis became violent, choked her, and she believed she was going to die. The attack stopped when visitors arrived at the residence. K.K. testified that the statement she gave to the police accurately described the events of April 13, 2004, and she identified the police photographs depicting the injuries Davis inflicted on her neck. However, on May 18, K.K. recanted her allegations because Davis had found a way, using his mother, to threaten K.K. if she did not recant. K.K. testified that she had agreed to appear at Davis's trial for offenses against R.W. because had she not recanted, R.W. “wouldn't have went through what I went through, and she—we wouldn't be here today.” She testified that Davis was “a monster.” Davis objected, and the circuit court instructed the jury to disregard that remark.

¶8 The jury convicted Davis.

¶9 Postconviction, Davis sought a new trial because K.K.'s testimony was erroneously admitted, and his trial counsel was ineffective in relation to her

³ Although Davis's trial counsel did not object, the circuit court instructed the jury to disregard K.K.'s “evil” comment and admonished her to offer only specific instances of conduct and not testimony relating to character.

testimony. Davis argued that K.K.'s evidence was too remote in time to be relevant. Citing K.K.'s testimony that she feared for her life and Davis was "evil," Davis argued that K.K.'s evidence was solely intended to establish that he had a propensity to engage in domestic violence and had a bad character. Finally, Davis argued that the probative value of K.K.'s testimony was outweighed by the danger of unfair prejudice.

¶10 The circuit court rejected Davis's postconviction challenge to the other acts ruling because K.K.'s evidence was not too remote. Implicitly, the circuit court determined that K.K.'s evidence was relevant and not unfairly prejudicial.

Other Acts Evidence

¶11 On appeal, Davis argues that the circuit court erroneously admitted K.K.'s testimony. Applying the *Sullivan* three-step other acts analysis, we review the circuit court's decision to admit this evidence for a misuse of discretion. *Sullivan*, 216 Wis. 2d at 772-73, 780.⁴

¶12 First, Davis argues that K.K.'s testimony was not indicative of intent or plan given the time lag between the incidents (2004 v. 2013), and therefore the evidence could only be prohibited propensity evidence. *Id.* at 782. We agree with the State that K.K.'s domestic abuse evidence established Davis's intent and motive to control his romantic partners. *State v. Hunt*, 2003 WI 81, ¶¶58-59, 263

⁴ The parties argue about the applicability of WIS. STAT. § 904.04(2)(b)1. (2015-16) which provides greater latitude with regard to admitting other acts evidence in domestic abuse cases. We decide this case under the *State v. Sullivan*, 216 Wis. 2d 768, 576 N.W.2d 30 (1998), other acts analysis. Therefore, we do not address the greater latitude arguments.

Wis. 2d 1, 666 N.W.2d 771. We conclude that K.K.’s evidence was offered for an acceptable purpose. *Sullivan*, 216 Wis. 2d at 772.

¶13 Second, we conclude that K.K.’s evidence was relevant, *id.*, and not too remote in time, *State v. Opalewski*, 2002 WI App 145, ¶20, 256 Wis. 2d 110, 647 N.W.2d 331. Davis’s conduct toward K.K. is the same type of conduct in the same type of setting as the conduct allegedly committed against R.W. The conduct was not so dissimilar as to render K.K.’s testimony irrelevant. *Id.*, ¶17 (pattern of occurrence indicating motive and intent). The ten-year period between the acts against K.K. and the acts against R.W. does not “negate all rational or logical connections between the fact to be proven and the other acts evidence.” *Id.*, ¶20. The time lag ““must be balanced against the uniqueness of the prior act of which evidence is offered.”” *Id.* (citation omitted). As stated, the evidence was relevant.

¶14 Third, we conclude that the probative value of K.K.’s evidence was not substantially outweighed by the danger of unfair prejudice. *Sullivan*, 216 Wis. 2d at 772-73. In his argument, Davis focuses on specific remarks K.K. made during her testimony including that Davis was “evil.” However, these statements were not before the circuit court when it ruled on the admissibility of K.K.’s testimony. We do not think that the substance of K.K.’s testimony about domestic abuse, to the extent known by the circuit court at the time it admitted her testimony,⁵ had “a tendency to influence the outcome of the jury deliberations by

⁵ Only the facts that were before the circuit court when it admitted the other acts evidence are relevant. *State v. Marinez*, 2011 WI 12, ¶45, 331 Wis. 2d 568, 797 N.W.2d 399.

the use of improper means, or ... arouse[d] in the jury a sense of horror or desire to punish.” *Opalewski*, 256 Wis. 2d 110, ¶23.

¶15 The record conclusively establishes that the circuit court properly exercised its discretion when it admitted K.K.’s testimony as other acts evidence. The circuit court did not erroneously exercise its discretion when it rejected this postconviction claim without a hearing. *Allen*, 274 Wis. 2d 568, ¶12.

Ineffective Assistance of Trial Counsel

¶16 To succeed on an ineffective assistance of counsel claim, a defendant must demonstrate that counsel’s representation was deficient and that the deficiency was prejudicial. *State v. Jeannie M.P.*, 2005 WI App 183, ¶6, 286 Wis. 2d 721, 703 N.W.2d 694. Both deficient performance and prejudice present mixed questions of fact and law. *Id.* We will uphold the circuit court’s factual findings unless they are clearly erroneous. *Id.* However, we review de novo whether counsel’s performance was deficient or prejudicial. *Id.*

¶17 Postconviction, Davis argued that his trial counsel was ineffective in relation to K.K.’s testimony because counsel failed to object when K.K. testified that Davis was “evil,” K.K. thought she was going to die, Davis’s “favorite one is choking,” “no one should be that mean,” and if she had not recanted, R.W. would not have experienced her ordeal. Davis alleged deficient performance because counsel did not object and prejudice because there was a reasonable likelihood of a different outcome had the jury not heard K.K.’s testimony.

¶18 Without holding a hearing, the circuit court rejected Davis’s ineffective assistance claim. The court conceded that K.K. delivered “a colorful rendition” of the events she experienced, interspersed with some personal opinions

about Davis. The court concluded that trial counsel's failure to object was not deficient performance.

¶19 On appeal, Davis argues that a reasonably prudent attorney would have objected to numerous aspects of K.K.'s testimony. On more than one occasion, counsel did object, and the circuit court either instructed the jury to disregard a particularly evocative piece of testimony (Davis was "evil" and "a monster") or directed K.K. not to stray from the particulars of her experience with Davis. Furthermore, the jury was properly instructed as to the limited purpose of K.K.'s testimony, and we presume the jury followed those instructions. *State v. LaCount*, 2008 WI 59, ¶23, 310 Wis. 2d 85, 750 N.W.2d 780. Based on the foregoing, we conclude that Davis was not prejudiced by his trial counsel's occasional failure to object to K.K.'s testimony. *Jeannie M.P.*, 286 Wis. 2d 721, ¶26 (citation omitted) (no "reasonable probability that," but for counsel's performance, "the result of the proceeding would have been different").

¶20 On this record, the circuit court did not erroneously exercise its discretion when it denied Davis's ineffective assistance claim without a hearing. *Allen*, 274 Wis. 2d 568, ¶12.

By the Court.—Judgment and order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5. (2015-16).

